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Mexico's Foreign Exchange Controls. Two Administrations-Two Solutions. Thorough and Benign

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MEXICO'S FOREIGN EXCHANGE CONTROLS. TWO ADMINISTRATIONS— TWO SOLUTIONS. THOROUGH AND BENIGN.*

IGNACIO GÓMEZ-PALACIO**

I. INTRODUCTION	268
II. HISTORICAL OVERVIEW	270
III. ENACTMENTS OF PRESIDENT JOSÉ LOPEZ PORTILLO	271
IV. ENACTMENTS OF PRESIDENT MIGUEL DE LA MADRID	286
A. <i>General Information</i>	286
B. <i>Exchange Rates</i>	287
1. Payment Obligations in Foreign Currency Contracted Prior to December 20, 1982	288
2. Payment Obligations in Foreign Currency Contracted After December 20, 1982	289
V. ADDITIONAL LEGISLATIVE REVISIONS	294
A. <i>In-bond Manufacturers</i>	294
B. <i>Financing</i>	295
C. <i>Imports</i>	296
D. <i>Foreign Service and International Organiza- tions</i>	297
E. <i>Rules of a General Nature</i>	297
F. <i>Foreign Exchange Sale Obligations</i>	298

*This Article refers to foreign exchange control legislation issued and published up to January 10, 1983.

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G. <i>Mex-Dollar Accounts</i>	298
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VI. CONCLUSION	299
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I. INTRODUCTION

Mexico's current economic status is the result of an unrestrained stage of accelerated growth unparalleled in the modern history of the country. Several factors, including the legitimization of political power and the need for social spending, have generated this growth period. In recent years, attractive export prices have produced much revenue from the exploitation of natural resources. An inordinate use of international credit also contributed to the process and insulated the country from the true costs of the growth period. Worldwide interest rate increases, a concurrent restriction on international credit, and a drop in prices of raw materials created a mounting economic predicament. These factors, in addition to economic conditions within Mexico, provoked exorbitant purchasing of foreign currency, primarily United States dollars.¹

Few nations in the world, whatever their stage of development, would not be envious of the sudden discovery of previously unknown natural resources of immense potential value. A discovery of such magnitude by a third world nation is even more welcome. Natural resources mean access to the hard currency of major developed nations. This hard currency is critical to development.

Mexico has long been an oil producing nation, but it was not an exporter of petroleum until early in the 1970's. Its known petroleum reserves at the time were modest. Petroleum production allowed the nation to meet domestic needs and to generate some needed foreign exchange. Oil importing nations began to suffer severe economic dislocations by the extensive price increases following the formation of the Organization of Petroleum Exporting Countries (OPEC). But Mexican oil exploration subsequently unearthed immense new reserves. The discovery of those reserves placed Mexico among the international oil elite. The "new oil" was viewed as assurance that Mexico would achieve record levels of economic growth. Mexico became a prime borrower in order to

1. Foreign currency demands came from both foreign and national residents as well as the Mexican banking system.

finance the growth of its newly emerging oil industry. This practice was fully accepted by the international lending community.

As the economic downturn made its impact and the Mexican government devalued, by two-thirds, the highly overvalued peso, Mexico depleted its foreign currency reserves to pay the public debt.² On September 1, 1982, the Mexican government established a generalized exchange control system³ to maintain sufficient reserves to meet its financial commitments abroad and to stop the flow of currency abroad through private transactions.⁴

There are many, powerful reasons for arguing that it was not advisable for Mexico to establish exchange controls. The most apparent problem stems from the difficulties inherent in any attempt to properly police the long border shared with the United States. The illegal flow of currency between Mexico and the United States, where free monetary exchange still exists, threatened an early demise for Mexico's exchange controls. Within a few days of the enactment of exchange controls, the Mexican currency exchange market was operating more actively north of the Mexican-American border than in Mexico. It should be understood that the enactment and implementation of this generalized exchange control was not the result of a reasoned, informed study as to the advantages and disadvantages of such policy. The economic chaos prevailing in Mexico at the time precluded any study of this type. The economic situation warranted immediate action to remedy the "cashier problem" faced by Mexico, its coffers emptied of foreign currency.

This generalized exchange control, established in the waning days of President López Portillo's administration, remained in effect for only three months and twenty days. The generalized exchange control was established on September 2, 1982 but was repealed on December 20, 1982. It was replaced by the Exchange

2. Since the first days of August, 1982 (before implementation of the exchange control), the Mexican peso has been devalued against the United States dollar from 46.00 pesos to 149.80 pesos, which was the price on January 10, 1983 of such foreign exchange in the free Mexican market.

3. See Decreto Que Establece el Control Generalizado de Cambios, D.O., Sept. 1, 1982 [hereinafter cited as September Exchange Control Decree], translated in 1 M. GORDON, *MULTINATIONAL CORPORATION LAW: MEXICO AND CENTRAL AMERICA* B.7 (rev. perm. ed. 1983) [hereinafter cited as 1 M. GORDON, *MULTINATIONAL*].

4. Payment of these obligations abroad called for more foreign exchange than was readily available. Action had to be taken to avoid falling into a general moratorium of payments. The Minister of Finance and Public Credit, Mr. Jesús Silva Herzog, said there was a "cashier problem."

Control Decree, enacted during President Miguel de la Madrid's administration, which reassessed the currency exchange rates, and permitted Mexican residents and Mexican companies to purchase and export foreign currency with no restrictions. For this reason this article will be divided into two segments. The first segment dealing with the López Portillo legislation will be mainly of historical importance whereas the second segment will analyze the legislation currently in effect. The current liberalized exchange control system allows free conversion by Mexican residents, but is subject to two major restrictions: (1) Mexican exporters and other persons receiving foreign currency must necessarily sell that currency to domestic credit institutions. (2) The Banco de México restricts the amount of foreign exchange it will release to investors.

This article is not intended as an exhaustive analysis of either the exchange system within the context of Mexican economic development or the constitutionality of the governmental regulations. The intent is rather to outline in an informative manner the establishment of Mexico's *entry* into that group of nations which, for reasons to be discussed, have found it necessary to establish barriers to the free flow of currency.

II. HISTORICAL OVERVIEW

President José López Portillo established the generalized exchange control system during the last days of his administration. Faced with coffers depleted of foreign currency, which was urgently needed to meet Mexico's financial commitments, the López Portillo administration hastily organized a wide-ranging currency control plan to stem the outflow of cash from Mexico. The generalized exchange control system remained in effect for less than four months.

On December 20, 1982, the new administration of President Miguel de la Madrid repealed the generalized control system and established in its stead a benign exchange control system. The López Portillo enactments established broad restrictive controls concerning monetary exchange. The de la Madrid regulations adopted more limited controls and, in effect, created a system of preferential exchange rates.⁵

5. Regardless that there was a so called free market, however, Mexican credit institutions, as of January 10, 1983, would sell foreign exchange (at the rate of 149.80 pesos per U.S. dollar) in the form of bank drafts, travelers checks and cashiers cheques up to a limit

III. ENACTMENTS OF PRESIDENT JOSÉ LÓPEZ PORTILLO

Since the modern Mexican State began a few years after the Mexican Revolution, Mexico traditionally has utilized a free monetary exchange system.⁶ On August 5, 1982, the establishment of an exchange control began through a series of circulars, resolutions, and decrees which ultimately led to the establishment by decree of the generalized exchange control system on September 1, 1982.⁷

On August 5, 1982, el Banco de México, S.A. (Bank of Mexico), the central bank in the Mexican banking system, issued a telex-circular, number 39/82, to all Mexican credit institutions.⁸ This telex-circular established for the first time two exchange rates, *preferential* and *ordinary*. The telex-circular stated that private independent purchases of foreign exchange would be subject to exchange rates governed by the market. It ordered, however, that the foreign currency sales to federal government entities and private companies would be subject to the preferential exchange rate in effect on the date of the sale. The August 5 telex-circular also provided that national currency at the preferential exchange rate could be used to pay any ordinary interest for loans furnished by the banks in foreign currency. The Bank of Mexico would then sell United States dollars to those credit institutions at the stated preferential rate, for the amount of those payments.

On the same date, August 5, when the Mexican peso was de-

of 1,000.00 U.S. dollars per person, per day. Foreign currency was sold only in the airport bank branches and only in this limited quantity. This circumstance was considered temporary while Mexico gathered in the necessary foreign currency funds in the short term, opening up the free market without any limitation whatever.

6. Until August 1982, the foreign investor who invested in Mexico was subject to a series of regulations regarding his participation in specific areas and to a maximum forty-nine percent share in the capital of Mexican companies. See *Ley Para Promover la Inversión Mexicana y Regular la Inversión Extranjera*, Feb. 7, 1973, D.O., Mar. 9, 1973 [hereinafter cited as Mexican Investment Law], translated in 1 M. GORDON, *MULTINATIONAL*, *supra* note 3, at B.2. The investor's expansion in the country was also regulated because investment in new lines of economic activity, new product lines and the creation of new establishments is controlled. Free exchange convertibility allowed the investor, however, to fully repatriate dividends and capital to the country of origin. Regulation in the area of foreign investments has not undergone any change. The change arose when the free repatriation of dividends and capital was limited. Since the new enactment of December 20, 1982, the foreign investor again is allowed to freely repatriate dividends and capital.

7. September Exchange Control Decree, *supra* note 3.

This system applied exclusively to the payment of ordinary interest attributable to obligations in foreign currency contracted by the applicants prior to August 5 in favor of residents outside Mexico and those given priority status by the Secretary of Commerce.

8. See 32 *El Mercado de Valores* 801 (Aug. 9, 1982).

valued approximately 100 percent, the Bank of Mexico sent another telex-circular, number 40/82, to all the credit institutions. This telex-circular imposed on these institutions the obligation to transfer excess foreign exchange to the Bank of Mexico with the promise of a later credit in a cash deposit account in national currency. The amount of credit would be calculated at the purchase rate of the interbank market effective on August 5, 1982. That rate was 49.50 Mexican pesos per U.S. dollar.

On August 13, 1982, the Rules Governing the Payment of Bank Deposits Denominated in Foreign Currency were published.⁹ The Rules interpreted Article 8 of the Monetary Law of the United Mexican States. Article 8 provided in relevant part, "the payment of obligations in foreign currency contracted inside or outside of the Republic, to be performed therein, shall be paid by delivering the equivalent in *national* currency at the exchange rate which rules in the place where and on the date when the payment is made."¹⁰ The restrictions of the Monetary Law were extended by the August 13th rules to include bank deposits in *foreign* currency. This extension created what in practice have been called "Mex-dollars," because dollars deposited in Mexican credit institutions could only be refunded in pesos.¹¹

Although legally justified in large part, the August 13th rules brought about wide criticism, since they seriously affected the foreign currency deposits of innumerable national and foreign investors.¹² Some criticisms are summarized as follows:

1. While the Monetary Law is of general character and applicable to all payment obligations in foreign currency, the subsequently published Law on Instruments and Operations of Credit

9. Reglas Para el Pago de Depósitos Bancarios Denominados en Moneda Extranjera, D.O., Aug. 13, 1982.

10. See Ley Monetaria de los Estados Unidos Mexicanos, D.O., July 27, 1931 (emphasis added) [hereinafter cited as the Monetary Law].

11. The new rules provided as follows:

First. Bank deposits denominated in foreign currency, created within or outside of the Republic, in order to be refunded in the Republic, shall be paid by delivering the equivalent in national currency at the general exchange rate which rules in the place where and on the date, when the payment is made.

Second. The credit institutions which are depositaries of the mentioned deposits, shall not pay them by means of remittances of foreign currency outside of the country, nor by transferring them to their branches or agencies abroad or other financial entities outside the country.

12. The Monetary Law had never been interpreted in this manner before. The Mexican banking system offered attractive interest rates which encouraged foreign investment.

especially regulates money "bank deposits". This law specifies in article 267 that "the deposit of a sum of money in Mexican or foreign currency, transfers ownership to the depositee and obligates him to refund the amount deposited in the *same specie*, except as provided for in the following article."¹³

2. Although Transitory Article 15 of the Monetary Law empowered the Secretary of Finance and Public Credit to decide on the execution of the Monetary Law provisions administratively, such power was not sufficient to substantially change the legal rule governing bank deposits of money.

3. Despite the fact that the Bank of Mexico was empowered to issue rules concerning transactions with gold, silver and foreign currency, it was not empowered to modify in depth the juristic nature of the bank deposit of money created by Article 267 of the Law on Credit Instruments.¹⁴

Five days after the rules were published extending the Monetary Law to foreign currency bank deposits, President López Portillo issued a decree which both confirmed the extension and the double exchange rate system. While technically repealing the first rule of the August 13th publication, López Portillo's decree gave further credence to the interpretation of article 8 by raising the bank telex-circular provision to the level of a Presidential Decree.¹⁵

13. Ley General de Títulos y Operaciones de Crédito, Aug. 26, 1932, D.O., Aug. 27, 1932 (emphasis added) [hereinafter cited as Law of Credit Instruments], translated in M. GORDON, COMMERCIAL, BUSINESS, AND TRADE LAWS OF MEXICO D.1 (1983).

14. See Ley General de Instituciones de Crédito y Organizaciones Auxiliares, D.O., May 31, 1941, [hereinafter cited as the Law on Credit Institutions]. The authority was pursuant to Article 138 bis 9 of the Law on Credit Institutions.

15. Decreto para proveer la adecuada observancia del art. 8 de la ley Monetaria de los Estados Unidos Mexicanos, D.O., Aug. 18, 1982, art. 1 [hereinafter cited as Article 8, Observance Decree].

The payment obligations contracted inside or outside of the Republic in order to be performed therein, to which Article 8 of the Monetary Law of the United Mexican States refers, shall be paid by delivering the equivalent in national currency of the foreign currency owed, at the exchange rate the Bank of Mexico sets for this purpose, paying attention to the situation of the exchange markets inside the country, both the *preferential* and the *ordinary*, to the evolution of prices and of interest rates, both internal and external, as well as to other economic elements the consideration of which is pertinent in order to determine the referred to exchange rate. Purchase and sale operations of foreign currency, remittances or transferences of funds in that currency to or from abroad, and operations analogous to the foregoing, shall continue to be ruled by the provisions applicable thereto regarding their nature. The Bank of Mexico shall determine which of the operations which the credit institutions can make with foreign exchange, are to be considered analogous for purposes of this article.

This decree has received the same legal criticisms as did the telex-circular rules.

President López Portillo issued another decree on August 18, 1982, which established requirements for the application of the special exchange rates. This decree required federal government agencies to deposit in the Bank of Mexico, through transfer of funds from abroad, all their foreign exchange, including that originating from credits or other financing outside the country, as well as receipts for export accounts. The agencies were empowered to maintain foreign exchange deposits in institutions other than the Bank of Mexico only with prior authorization of the Secretary of Finance and Public Credit.¹⁶

The purpose of the second August 18th decree was to avoid having foreign currency funds abroad which could be subject to attachment by foreign creditors of the Mexican government as well as to concentrate all foreign exchange in the central Mexican bank. It was also provided that all the Petroleos Mexicanos' income received in payment for exports was required to be deposited in the Bank of Mexico.¹⁷ National credit institutions also remained obligated to deposit all foreign exchange that they owned in the Bank of Mexico and were able to maintain deposits in other institutions only with authorization of the Secretary of Finance and Public Credit.¹⁸

This decree further established a registry in the Secretary of Finance and Public Credit in which private enterprises in Mexico would record credits in favor of financial entities from abroad. The vouchers issued upon registration allowed the enterprise to obtain the required foreign exchange at the *preferential* exchange rate solely for payment of ordinary interest debts.¹⁹ This *preferential* rate was also granted to government agencies and entities to cover interest and expenses of foreign currency obligations charged by foreign financial entities. The agencies and entities, however, were required to obtain vouchers from the Secretary of Finance and Public Credit which verified the obligations.

The Bank of Mexico was empowered under the decree to sell foreign exchange at the *preferential* rate of payment for imports of

16. See *supra* notes 12-14 and accompanying text.

17. Decreto Que Establece Reglas Para Atender Requerimientos de Divisas a Tipos de Cambio, Especiales, D.O., Aug. 18, 1982, art. 2.

18. *Id.* at art. 4.

19. *Id.* at art. 5.

basic necessities viewed as priority for the country. The *preferential* exchange rate was also available to credit institutions up to the amount of interest corresponding to loans in foreign currency granted up to August 5, 1982.²⁰ In addition, the decree spelled out the restrictions placed on the sale of foreign currency at the *ordinary* rate of exchange.²¹

On September 1, 1982, for the first time in Mexican history, a generalized exchange control system was established by way of the decree issued by President José López Portillo and countersigned by all members of his cabinet.²² This economically historic decree repealed the earlier decrees and rules.²³ Together with the resolutions and rules issued subsequently, it outlined a very thorough exchange control system. It was to survive, however, less than four months.

The decree stated that the export and import of foreign exchange could be carried out only through the Bank of Mexico, or on the Bank's order and account.²⁴ Any export or import of foreign exchange attempted in any other form would be considered contra-

20. *Id.* at art. 9.

21. The Bank of Mexico was empowered to sell foreign exchange at the *ordinary* exchange rate, "in the measure permitted by its available supply," according to general rules. These general rules were subsequently not issued. Qualified purchasers of the foreign exchange ranged from financial entities established in Mexico, to bank depositors who had created trust accounts to secure payment in the same amount. Foreign exchange could also be purchased by persons who had entered into deposit or securities borrowing operations with Mexican credit institutions ("reporto") which gave them access to the facilities of the Special Financing Program handled by the Bank of Mexico. The Secretariat of Finance and Public Credit was given discretion to sell foreign exchange to international organizations and other analogous institutions. Finally, foreign citizens who rendered their services in domestic and foreign financial institutions were allowed to purchase foreign exchange but only up to the value of the bank deposits denominated in foreign currency possessed by them on Aug. 12, 1982 and only provided that said deposits were payable in Mexico. *Id.* at art. 10.

The Secretariat of Commerce issued a Resolution in force as of Aug. 25, 1982, stating that certification for acquiring foreign exchange at the *preferential* exchange rate would only be issued when basic social consumption, such as food imports were involved, or when necessary input required production activities and capital goods, providing these imports were priorities for the country. It was also stipulated that the certifications would be granted directly to the persons carrying out the importation, and that they would be inalienable, with an effective term of 30 calendar days, tolled from the date of issuance. This resolution also stated that the application for a certification would have to be filed within 30 calendar days, following legal introduction of the merchandise into the country. See The Resolution which Established the Requisites and the Procedure for the Granting of Certifications in order to Acquire Foreign Exchange at the Preferential Exchange Rate, for Payment of the Imports for Payment of the Goods Indicated, D.O., Aug. 12, 1982, at art. 1, 3, 4.

22. See *supra* note 3.

23. *Id.* at transitory art. 2.

24. *Id.* at art. 1.

band. This restriction also applied to all foreign exchange acquired abroad by persons or legal entities, Mexican or foreign, who were residents of Mexico, regardless of the manner earned. These transactions would be carried out under an exchange rate determined by the Bank of Mexico. The exchange rate includes both *preferential* and *ordinary* rates of exchange as well as any special rate which might be established.²⁵ The decree also provided control of the acquisition of foreign exchange, through a special registry, requiring identification of the purchaser with the purchaser's Federal Registry of Taxpayers number.²⁶

A list of twelve priority payments abroad was established under the decree for the sale of foreign exchange at the *preferential*, *ordinary*, and *special* exchange rates.²⁷ Commitments entered into by the federal government were given first priority; debts acquired by semi-state public administration entities, second; and payments by the Mexican government to international organizations, third. The last three priorities included royalties and commitments abroad of national companies with foreign investment or foreign companies operating in the country; travel expenses of persons for business, work, or health reasons; and personal travel expenses for tourist or recreational purposes.²⁸ Regulations for the implementation of the priority payments were provided for by the decree.²⁹

The September 1st decree also provided specific procedures for those Mexican organizations dealing with foreigners. The organizations were allowed to receive or obtain foreign currency but were required to deposit it immediately in the national credit system and were prohibited from selling foreign exchange or currency. The organizations covered by this section of the decree included those rendering tourist services, enterprises or entities subject to the General Law on Communications, authorized exchange houses, companies normally conducting operations with foreigners, and companies legally operating in border zones and free zones or pe-

25. *Id.* at art. 5 (All foreign currency had to be exchanged in the Bank of Mexico or in the national banking and credit system. These banks would act for the account and order of the owners at the *ordinary* exchange rate set by the Bank).

26. *Id.* at art. 7.

27. *Id.* at art. 8.

28. *Id.* at art. 8. Payment of royalties by Mexican companies without foreign capital was not listed.

29. *Id.* at art. 9.

rimeters.³⁰ It was also stated that any person residing in the national territory who wished to travel abroad could buy the maximum amount of foreign exchange authorized at the ordinary exchange rate.³¹

An example of the force of this decree is evident in article 17 which stated that any person or entity receiving foreign exchange for the account of the Bank of Mexico and not delivering it on the day received or the following working day, would be required to pay late payment interests and indemnities for the damages caused by their action, surrender the permit or concession, or suffer the corresponding penalty according to law.³² Deposits in foreign currency made prior to the decree were to be eliminated when matured and liquidated in national currency at the current exchange rate.³³

Several resolutions were issued following the September 1st decree. The first resolution, published on September 8th, by the Secretary of Finance and Public Credit, concerned the continuance of the exportation of gold as permitted by the Bank of Mexico.³⁴ The second resolution, one of two published on September 10th by the Secretary of Commerce, regulated the exportation of various items, including bills of legal tender in Mexican and foreign banks, silver, jewels, and gold and silver work.³⁵ The third resolution regulated importation of bills of legal tender to Mexico and foreign bank bills, excluding bills and hard currency valued less than 5,000 Mexican pesos.

On September 14, 1982, a broad publication was made containing ninety-five general rules governing the two-week old general exchange control system. The extensive set of rules was issued by the Secretaries of Finance and Public Credit, Planning and Programming, Foreign Affairs, Patrimony and Industrial Development, Commerce, Agriculture and Hydraulic Resources, Communications and Transportation, Tourism, the Bank of Mexico, and the National Banking and Insurance Commission. The fundamental

30. *Id.* at art. 11.

31. *Id.* at art. 14.

32. *Id.* at art. 17.

33. *Id.* at transitory art. 3.

34. Acuerdo que establece que la exportación de oro quedará sujeta a previo permiso del Banco de México, D.O., Sept. 8, 1982 [hereinafter cited as *Exportation of Gold Agreement*].

35. Exports of silverwork made by foreign residents when they left the country were excluded from control when the value was less than 100,000 Mexican pesos.

regulations from this publication included the following:

1. Three types of parity were established. The *ordinary* at 70 pesos, the *preferential* at 50 pesos, both in relation to the U.S. dollar, and the *special* parities which the Bank of Mexico was to determine according to the needs of the country.³⁶

2. The *ordinary* exchange rate applied to refunds of bank deposits denominated in foreign currency, regardless of the nationality and residency of the depositor or investor.³⁷

3. Credit institutions of the country were forbidden to receive deposits to be credited to savings accounts, checks, investments to be withdrawn on pre-established days or subject to a term. The institutions were also prohibited from furnishing credit of any kind in foreign currency.³⁸

4. Imports would require a prior import permit.³⁹ An import license, however, did not give the right to obtain foreign exchange, which required a special procedure.⁴⁰

5. Exports would be facilitated by establishing controls to avoid scarcity of national provisions, specifically foods and basic products.⁴¹ Foreign exchange obtained abroad from exports had to be returned to the country and exchanged in the Bank of Mexico at the *ordinary* exchange rate pursuant to the procedure established.⁴²

6. The Bank of Mexico was empowered to establish compensation mechanisms for certain industries so the exchange obtained by an exporter could be used by the exporter to import or to make authorized payments abroad.⁴³

36. See General Rules Governing the Exchange Control, Sept. 14, 1982, D.O., Sept. 15, 1982, at rule 1.

Rule 2 specified the instances in which the *preferential* exchange rate was applied, while rule 4 specified when the *ordinary* exchange rate was applied, establishing a list according to the order of priority. *Id.* at rule 2 & 4.

37. *Id.* at rule 5.

38. *Id.* at rule 6.

39. *Id.* at rule 9.

40. *Id.* at rules 10-23. A procedure was established for subsequent imports under which information about prior imports had to be disclosed to the Secretary of Commerce such as the nature, quality, volume and use thereof. *Id.* at rule 16.

41. This included farm and cattle products, forestry products, animal resources, and ores. *Id.* at rule 24.

42. *Id.* at rules 25 & 26.

43. These industries, among others, included oil, automotive, and tourism. *Id.* at rules 30 & 31.

7. The government administrative agencies and entities, which required foreign exchange to meet payments of financial commitments abroad, were given the power to obtain the currency at the *preferential* exchange rate. Private or social enterprises could obtain foreign exchange at the *preferential* exchange rate for foreign currency payments of interests and principal in the event the payment term was not renewed or extended. The credit involved, however, must have been furnished prior to September 1st, 1982, and recorded with the Secretary of Finance and Public Credit.⁴⁴

8. Detailed regulations were established requiring registration with the appropriate authority of payments abroad in foreign currency for obligations other than financial commitments outside the country.⁴⁵ All companies with established credit contracts before September 1st also were required to register.⁴⁶

9. An optional system was established concerning investment funds maintained abroad which had been transferred or established prior to September 1st. Investors were afforded the choice of Mexican credit institutions⁴⁷ to facilitate the repatriation of those funds through an established procedure.⁴⁸

10. In border zones and free zones, imports were made subject to prior license. Only basic consumer products not provided from within the country could be imported at the *preferential* exchange rate.⁴⁹ Enterprises operating legally in border zones and free zones, which received or obtained foreign currency or exchange, had to deliver it to a credit institution of the country on the following working day at the latest.⁵⁰

44. The creditor financial entity domiciled outside of the Republic had to be recorded in the registry of credit institutions maintained by the Secretary of Finance and Public Credit. If these requirements were not fulfilled, applications for foreign exchange were not processed. *Id.* at rules 8, 33 & 34.

45. The identification of the payment, the amount, the payment schedule, and specification of the identity of the foreign creditor had to appear in this registry. *Id.* at rule 43 (a special registry was created although contracts for the transfer of technology and construction contracts with federal agencies were registered elsewhere).

46. *Id.*

47. *Id.* at rule 45.

48. On September 13, 1982, a notice to the general public from the Bank of Mexico was published in the major newspapers establishing the system of capital repatriation "for the purpose of making it easier for those who, in keeping with the call made by the President of the Republic, cooperate in the solution to the financial problems the country is facing, by bringing foreign exchange into the country through the substitution of investments which they have abroad by others which they undertake within the Republic."

49. *Id.* at rules 49 & 50.

50. *Id.* at rule 52.

11. In-bond manufacturing companies ("maquiladoras") registered with the Secretary of Patrimony and Industrial Development were required to open a special account in foreign currency, against which they would draw the payment of their obligations in national currency at the ordinary exchange rate. Manufacturing companies were forbidden to deposit income outside the country.⁵¹ All deposits made in the special account had to be in foreign currency, and a minimum balance was required corresponding to the average of one week of operations.⁵²

12. Departures of Mexican residents for reasons of health, business, study, and pleasure trips were also regulated.⁵³

13. Residents of the country returning from abroad were required to sell the foreign exchange they brought back with them.⁵⁴

14. Residents outside the country were required to declare the foreign exchange they brought into the country, and were allowed to purchase up to 250 U.S. dollars upon leaving.⁵⁵

15. All residents in Mexico were forbidden to sell foreign currency or to exchange currency freely.⁵⁶ Only the Bank of Mexico and the nation's credit institutions, or other entities expressly authorized by the Bank of Mexico, were allowed to do so.⁵⁷ A specific rule prohibited hotels and travel agencies from selling foreign exchange to users or the public in general.⁵⁸

The foregoing outline demonstrates the meticulousness and extensive scope of the exchange control regulation, as set forth by the publication of September 14. This outline constitutes what President López Portillo's September 1st decree referred to as a generalized exchange control system.⁵⁹

51. *Id.* at rule 55.

52. *Id.* at rules 56 & 57.

53. *Id.* at rules 61-71.

54. *Id.* at rule 72.

55. *Id.* at rule 73.

56. *Id.* at rule 88. A special regulation was also provided regarding diplomatic and consular representations, international organizations, and analogous institutions located in Mexico, as well as foreign citizens who render services in Mexico, to the effect that they could open special accounts in foreign currency. Rules 74-79. The telephone, airline, shipping, and railway companies, as well as those involving general communication with the exterior were authorized to maintain special foreign exchange accounts. Rules 80-83.

57. *Id.* at rule 88.

58. *Id.* at rule 89. The purchase of foreign publications is regulated. *Id.* at rule 92.

59. The Secretariat of Commerce issued a Resolution specifying the first list of products for the importation of which authorizations could be granted to purchase foreign exchange, at the preferential exchange rate. This list was expanded in later publications. D.O.,

On September 27th and 28th, three circulars were issued by the Secretary of Patrimony and Industrial Development to regulate payments originating from different national enterprises to foreigners, including royalties, dividends, and different commitments. The circulars specified they had been issued with the prior participation or intervention of the National Commission on Foreign Investments. Only one circular stated that it was issued on the request of the Bank of Mexico. These circulars, however, were considered invalid because they were issued by an authority other than that designated by the September decree, the National Commission on Foreign Investment.

The first circular concerned the registration of payments derived from different commitments and specified situations where, with prior registration, foreign exchange could be obtained for certain payments. Among those situations were payments for emergency repairs, instruction or training at institutions linked with industry or foreign investment,⁶⁰ exploitation of copyrights in certain fields,⁶¹ investment in the stock market where repatriation was contemplated,⁶² and sale of real estate located outside the prohibited zones, but related to foreign investment.

The second and third circulars concerned royalties and dividends and required registration of specific data before foreign exchange could be obtained to make those payments abroad. Agreements or contracts for royalties had to be registered in the National Registry of the Transfer of Technology. An application for permission to pay these royalties in foreign currency had to be made to the main office of Foreign Investments and the Transfer of Technology.⁶³ As to the payment of dividends, commitments

Sept. 17, 1982.

60. The National Commission on Foreign Investments recently had made the investor's commitment to transfer technology to some Mexican teaching institutions the condition for granting these authorizations.

61. These fields included publishing, cinematography, recording, radio, and television. This was due to the fact that these payments were not included in the acts, agreements, or contracts which must be recorded in the National Registry of the Transfer of Technology, which are referred to in the Circular concerning Registration for Payment with Foreign Exchange, Royalties, and Commitments Abroad. See *Ley Sobre el Control y Registro de la Transferencia de Tecnología y el Veto y Explotación de Patentes y Marcas*, art. 3-V, Dec. 29, 1981, D.O., Jan. 11, 1982 [hereinafter cited as 1981 Mexican Transfer of Technology Law], translated in 1 M. GORDON, *MULTINATIONAL* *supra* note 3, at B.2b.

62. The term "repatriation" was not defined.

63. See 1981 Mexican Transfer of Technology Law, *supra* note 61, at art. 2. The article states that there must be recorded in the National Registry of the Transfer of Technology the following: all acts, agreements and contracts which are to produce effects in the

had to be registered with the same office, including the minutes from the last general stockholders meeting when the dividend was declared.

Following the publication of the circulars was a series of resolutions concerning several aspects of the Mexican economy. One resolution, published October 5, 1982, set up a registry for handling special accounts in foreign exchange in Mexico or abroad for registered entities which render tourist services.⁶⁴ A second resolution, published the following day, determined the basic consumer products and indispensable production goods for which authorization to import into the border and free zones could be granted in order to purchase foreign exchange at the preferred rate.⁶⁵ The third resolution in this series, published on October 8, 1982, provided for the registration of indebtedness of persons or legal entities in favor of foreign suppliers.⁶⁶

national territory relative to: a) the concession to use or authorization to exploit trademarks; b) the concession to use or authorization to exploit patented inventions or improvements and the certificates of invention; c) the concession to use or authorization to exploit industrial models and drawings; d) the assignment of trademarks; e) the assignment of patents; f) the concession or authorization to use trade names; g) the transmission of technical knowledge through plans, diagrams, models, instructions, formulations, specifications, education and training of personnel, and other means; h) technical assistance in any given manner; i) provision of basic or detailed engineering; j) services to operate or administer enterprises; k) advisory services, consulting and supervision when made by a foreign natural or juridical person or its subsidiaries independent of its domicile; l) concession of rights under a copyright which implies industrial undertaking; and m) computer programs. See *The Regulation of the Law on the Control and Registration of the Transfer of Technology and the Use and Exploitation of Patents and Trademarks*, Nov. 16, 1982, D.O., Nov. 25, 1982, *translated in* 1 M. GORDON, *MULTINATIONAL* *supra* note 3, at B.2b.

64. Acuerdo que establece un registro para el manejo de cuentas especiales en divisas en el país o el extranjero, D.O., Oct. 5, 1982.

65. Acuerdo que determina los productos básicos de consumo popular y bienes de producción indispensables en las franjas fronterizas y zonas libres para cuya importación a las mismas podrán otorgarse autorizaciones para adquirir divisas al tipo de cambio preferencial, D.O., Oct. 6, 1982.

66. This Resolution provided for registration of the indebtedness of persons or legal entities in favor of foreign suppliers resulting from the purchase of merchandise brought into the country. The Resolution states the procedure and the documents which must be filed for registration of the debt, among which are included the copy of the contract from which the debt is derived, and the other documentation which specifies the terms and conditions of the operation, as well as the corresponding invoices. A list of errata of this Resolution was published in the D.O. on November 16, 1982, adding information to be provided in order to obtain registration, including documents such as the confirmation issued by the foreign supplier of the statement of account of the debt, the signed copy of the import documents and the copy of the proof of the last payment made by the company to its foreign supplier. The Resolution required that an application be presented for each foreign supplier. Once the application was approved the Secretary of Commerce would issue a certificate which would serve for the purchase of the indicated foreign exchange.

The above resolutions were followed on October 11, by General Resolutions 18 and 19 issued by the National Commission on Foreign Investments. The first is relative to national enterprises with foreign investments or foreign enterprises which operate in Mexico.⁶⁷ The second contains the criteria for interpretations of section XVII of Article 13 of the Law to Promote Mexican Investment and to Regulate Foreign Investment.⁶⁸

General Resolution No. 18 provided that Mexican companies with foreign equity investment and regulated foreign companies may purchase available foreign exchange to fulfill commitments for payments of royalties, dividends, and other commitments.⁶⁹ Resolution No. 18 also stated that companies which need to purchase foreign exchange must file a petition with the Executive Secretary

67. See Resolución General No. 18, Relativa a las Empresas Nacionales con Inversión Extranjera o a las Empresas Extranjeras que Operen en el País, para Efectos de Pago al Exterior por Concepto de Regalías y Compromisos de estas Empresas. Oct. 8, 1982, D.O., Oct. 11, 1982 [hereinafter cited as General Resolution No. 18], *translated in* 1 M. GORDON, MULTINATIONAL *supra* note 3, at B.2a.

68. Resolución General No. 19, que contiene el Criterio de Interpretación del Artículo 13, fracción XVII de la Ley para Promover la Inversión Mexicana y Regular la Inversión Extranjera, Oct. 8, 1982, D.O., Oct. 11, 1982 [hereinafter cited as General Resolution No. 19], *translated in* 1 M. GORDON, MULTINATIONAL *supra* note 3, at B.2a.

69. General Resolution No. 18, at art. 4. The Resolution provides that the payment of profits must be made on the basis of the following formula: profits to be repatriated shall not exceed 15% with respect to the capital account, less the revaluation of assets (capitalized or not). The 15% may be modified by the Commission according to the conditions of the financial markets. Then Executive Secretary of the Commission, Héctor Alvarez de la Cadena, said in a public conference held on November 9, 1982, that the 15% was a figure which was determined keeping in mind the prime rate of the United States plus two points, which also coincides with the average profit of the companies listed on the Mexican Stock Exchange. *Id.*

General Resolution No. 18 provides that Mexican enterprises may take duly substantiated indirect exports into account in the bookkeeping of their foreign exchange budget. Although the term "indirect exports" is not defined, it is apparently understood as the incorporation of raw materials, parts, and components produced in Mexico, into a single product which is then sold abroad. It is stipulated that foreign investors who have purchased stocks quoted on the Mexican Stock Exchange may repatriate the benefits said stock generate, by showing the corresponding Certificate of Registration, issued by the National Registry of Foreign Investments. Repatriation of benefits derived from any other kind of security must be approved by the National Commission on Foreign Investments. Likewise, the National Commission on Foreign Investments is empowered to decide in reference to the repatriation of the product of the sale of stocks, enterprises or other goods, by Mexicanization, liquidation or merger, as well as on the gains derived from any kind of operations performed by foreign investors. Finally, Resolution No. 18 stipulates that companies which need to purchase foreign exchange, shall file their petition with the Executive Secretary of the National Commission of Foreign Investments, in accordance with the circulars which are applicable thereto, issued by the Secretariat of Patrimony and Industrial Development. See Circular Concerning Registration for Payments with Foreign Exchange to the Exterior, Derived from Different Commitments, D.O., Sept. 27, 1982.

of the National Commission on Foreign Investment, in accordance with the applicable circulars of September 27 and 28, 1982.⁷⁰ Since these circulars were thought to be invalid due to lack of authority to publish, the part of General Resolution No. 18 which is founded on the circulars is also considered invalid.

General Resolution No. 19 granted facilities to foreign creditors who receive national currency through a special account opened by Mexican debtors in national credit institutions. In effect, the National Commission on Foreign Investment was given the power to furnish facilities so the amount of debts is channeled by the foreign creditors "to the undertaking of joint investments, the commencement of new corporations, capitalization of liabilities through increases in capital stock, opening new establishments, and initiating of new areas of economic activity or new product lines."⁷¹

In exercising this power the resolution directed the Commission to consider the exporting efforts to be made by the enterprises, the surpluses generated by previous exportations, and the reinvestment of profits.⁷² The facilities to be furnished were extended to foreign investment projects undertaken by foreign companies or individuals who had foreign currency accounts in national credits institutions as of August 31, 1982.⁷³

Additional resolutions were published in October and November 1982. These resolutions include the following:

1. The main provisions of the Bank of Mexico governing the exchange control were published October 15.⁷⁴ They included a

70. *Id.* at para. 9.

71. General Resolution No. 19, para. 2.

72. *Id.* at para. 3.

73. *Id.* at para. 4.

74. These provisions are made up by the following telex-circulars: T-C 51/82, concerning rates of exchange and the nonexistence of credits in dollars; T-C 57/82, prohibiting the transfer of national currency abroad; T-C 61/82, concerning foreign exchange which can be bought and the purchase of bank bills and travelers checks, interbank procedure, purchase of silver and gold and gold coin without face value; T-C 62/82, regarding the treatment of "pagafis"; T-C 81/82, specifying operations subject to ordinary rate of exchange; T-C 61/82, and T-C 80/82, concerning importations; T-C 67/82, concerning expenses associated with importation and exportation; T-C 64/82, concerning the payment of commitments derived from the debt in foreign currency, of private or social enterprises in favor of financial entities abroad; T-C 76/82, concerning compensation accounts for exporting enterprises; T-C 77/82, concerning compensation accounts for tourist service enterprises; T-C 71/82 and T-C 75/82, concerning in-bond manufacturers; T-C 78/82, concerning deposit accounts in U.S. dollars for companies resident of border strips and free zones; T-C 68/82, concerning departures abroad; T-C 59/82, concerning repatriation of capital (this telex-circular reproduces

resolution issued by the Secretary of Communications and Transport which created the support unit called the Commission on Registration and Control of Foreign Exchange of the Communications and Transport Sector on October 26.

2. On November 3 the Secretary of Finance published general rules governing the operation of currency exchange houses and brokerage houses in the northern border zone. According to these rules, the currency exchange and brokerage houses located in certain areas could be authorized to buy U.S. dollars in bills, coin, or travelers checks and to sell U.S. dollars in bills or coin, for the account of the Bank of Mexico.⁷⁵ Buying and selling exchange rates would be determined by local market conditions.⁷⁶

3. On November 16 a resolution was published concerning the general rules on the foreign trade exchange control for credit in foreign currency payable abroad. According to these rules, the country's credit institutions were given the power to furnish customers with credit or guarantees in foreign currency for the production of goods subject to exportation. The purpose of these rules was to maintain a stock of products subject to export and to finance priority imports.

4. The main legal provisions governing the exchange control, issued by the Bank of Mexico through telex-circulars to all of the country's credit institutions from October 15 to November 15, 1982, was also published on November 16.⁷⁷

chapter VII of the General Rules Governing the Exchange Control, D.O., Sept. 14, 1982); and T-C 54/82, concerning foreign representative organs. On the matter of foreign representative organs T-C 55/82 was also issued, as were telex-circulars; T-C 70/82, concerning foreign correspondents, and T-C 74/82, concerning payments abroad with foreign exchange which residents had acquired before the generalized exchange control system was established.

75. General Rules Governing the Exchange Control, rule 1, Sept. 14, 1982, D.O., Sept. 15, 1982.

76. *Id.* at rule 2. Individuals residing in the mentioned strips and zones were authorized to buy U.S. dollars in bills and coins in an amount not exceeding U.S. \$1,500 per month. In order to make the purchase, persons had to file certain data such as a Federal Registry of Taxpayers number, documents substantiating residency, a declaration under oath that the person was not registered in any other money exchange or brokerage house, etc. See General Rules Governing the Operation of Money Exchange Houses and Brokerage Houses in the Northern Border Strip, Nov. 3, 1982, D.O., Nov. 3, 1982. Rules 5 & 6.

77. In this publication, the following telex-circulars were included: T-C 51/82, concerning general provisions; T-C 98/82, concerning early liquidation of credit and bank deposits denominated in foreign currency payable in the Republic; T-C 95/82, concerning the liquidation of credit payable outside of the Republic; T-C 100/82, concerning the ordinary rate of exchange for financing exports; T-C 94/82, concerning expenses associated with imports and exports; T-C 89/82, concerning compensation accounts for exporters; T-C 101/82,

The foregoing demonstrates the extensive regulatory activity of the Mexican executive power to establish a generalized exchange control system.

IV. ENACTMENTS OF PRESIDENT MIGUEL DE LA MADRID

A. *General Information*

The Exchange Control Decree became effective on December 20, 1982, seven days after it was published in the *Diario Oficial de la Federacion* on December 13, 1982.⁷⁸ This decree completely changed the Mexican exchange control system in effect since September 1, 1982. All previously published provisions in conflict with this latest decree were repealed, including López Portillo's September 1st decree and all subsequent rules and circulars, as well as the resolution requiring prior permits for gold exportation. The new decree effectively repealed all previous exchange legislation which regulated the activities of foreign investors in the country, including the previously discussed circulars published September 27th and 28th.⁷⁹

Although not specifically repealed by the Exchange Control Decree, General Resolution No. 18 was technically unenforceable since it was based on the repealed circulars published September 27th and 28th. Furthermore, as provided by the Exchange Control Decree, everything therein which opposed the latter was repealed, as well as all rules and circulars based on the September 1st Decree. General Resolution No. 18, however, was not considered a "rule" or "circular".

General Resolution No. 19, issued by the National Commis-

concerning modifications to accounts for exporters and tourist service enterprises; T-C 91/82, concerning rates of interest applicable to special deposit accounts; T-C 96/82, concerning departures abroad; and T-C 86/82, concerning representatives of foreign governments.

The Secretary of Fisheries published a resolution which required persons desiring to obtain foreign exchange, from the Special Compensation Account of the Fisheries Sector, which is authorized by the Bank of Mexico, to register in order to fulfill commitments abroad. Prior registration would be required of the interested natural persons, legal entities, and the instruments which initiated the corresponding commitments. *See generally*, Resolution which Establishes the Registry for Payment with Foreign Exchange Abroad, of Different Commitments by Physical Persons or Legal Entities of the Fisheries Sector, with the Right to Use Foreign Exchange. D.O., Nov. 30, 1982.

78. Decreto de Control de Cambio, Dec. 10, 1982, D.O., Dec. 13, 1982 [hereinafter cited as the Exchange Control Decree], *translated in*, 1 M. GORDON, *MULTINATIONAL supra* note 3, at B.7.

79. *See supra* notes 58-62 and accompanying text.

sion on Foreign Investments, must be adjusted to the new regulation, since it is based on the September 1 decree establishing the generalized exchange control system and on the September 14th publication of the general rules for that system. Nevertheless, the facilities referred to by General Resolution No. 19 must prevail, in order that the debt amount of Mexican companies with foreign creditors may be channelled by foreign creditors to those mentioned activities. These activities include joint ventures, creation of new corporations, capitalization of liabilities through increases in the capital stock, opening of new establishments, relocations, and initiating of new fields of economic activities or new product lines. Specifically not affected by the Exchange Control Decree was the requirement of registration before the appropriate agency of debts in favor of financial entities from abroad and foreign suppliers.⁸⁰

The Exchange Control Decree is not a decree of generalized regulation of exchange control, but rather a decree of exception. With the exception of certain activities which remain controlled under the decree, all others returned to the system of free exchange convertibility. This system is subject to Article 11 of the Exchange Control Decree, which states that the Secretary of Finance and Public Credit and the Secretary of Commerce will issue the complementary provisions necessary for due observance of the decree. Thus, in the absence of the issuance of complementary provisions, the foreign investor is free to repatriate capital and dividends to his country of origin, as well as to pay royalties and whatever other obligations he has abroad, for which purpose he must purchase the corresponding foreign exchange at the free rate established by the Exchange Control Decree without limit.

B. Exchange Rates

The Exchange Control Decree basically provides three ex-

80. The Exchange Control Decree states the permanence of the mentioned registries, but not the enforceability of the decrees which created them. The registry of debts in favor of financial entities abroad was created by the Decree which Establishes Rules for Attending to the Requirements of Foreign Exchange at Special Rates of Exchange, *Diario Oficial*, August 18, 1982, repealed by the Decree which Establishes the Generalized Exchange Control, Sept. 1, 1982, and again fully restored by Title V of the General Rules Governing the Exchange Control, Sept. 14, 1982. These last rules were repealed by the Exchange Control Decree except as regarded in the permanence of this register. The register of debts in favor of foreign suppliers was established by the relative resolution, which was published in the *Diario Oficial* on October 8, 1982.

change rates: *controlled*, *special*, and *free*. Article 9 states that all transactions in foreign exchange not subject to the *controlled* market are included in the *free* market. Transactions in the *free* market, including the buying, selling, possession, and transfer of foreign currency, are not subject to any restrictions. On the other hand, article 10 states that the buying and selling of foreign exchange which corresponds to transactions included in the free market will be conducted at the exchange rates which the contracting parties agree upon. The *special* exchange rate provided by transitory article 3 would be applicable to the payment of obligations in foreign currency contracted prior to the effective date of the Exchange Control Decree. Article 2 of the Decree, specified the operations subject to the controlled foreign exchange market. On the day the Exchange Control Decree became enforceable the rates of exchange of the peso in relation to the U.S. dollar were set as follows:⁸¹

Controlled Rate of Exchange

Buying: 95.00 (pesos to the dollar) Selling: 95.10

Special Rate of Exchange

70.00

Rate of Exchange of the Free Market

Buying: 148.50 Selling: 150.00

1. Payment Obligations in Foreign Currency Contracted Prior to December 20, 1982

Transitory Article 3 of the Exchange Control Decree provides that payment obligations in foreign currency contracted prior to the effective date of the Exchange Control Decree, to be performed in Mexico, may be paid by delivering the equivalent in national money at the *special* rate of exchange which the Bank of Mexico determines and which is in effect on the date of payment.

81. In the Diario Oficial of December 20, 1982, the Bank of Mexico determined the rates of exchange with respect to the U.S. dollar, for the *controlled* rate and the *special* rate, to prevail in the market from December 20-31, 1982, stating the quotation thereof each day. On December 31, 1982, the *controlled* rate of exchange was set as follows: buying 96.46 (pesos to the dollar); selling 96.53. The *special* rate of exchange was 71.54. On a daily basis, there is a slipping of the Mexican currency with respect to the dollar in the mentioned rates of exchange, which the Mexican Government has announced would be approximately 50% during the following year. The free market would be ruled by the daily interaction of supply and demand. Until December 31, 1982, however, it remained unchanged.

An exception is made for the obligations of the Bank of Mexico and the country's credit institutions which derive from the "Special Financing Program" administered by the Bank. In order to participate in the program these obligations will have to be liquidated at the *controlled* rate of exchange if a creditor had contracted credits payable abroad and these credits are outstanding when the Exchange Control Decree became effective.

Transitory article 3 specifies that the Bank of Mexico shall determine the *special* rate of exchange "*taking into account the characteristics of the operations to which it shall apply.*" By virtue of this, the Bank of Mexico apparently can specify several *special* exchange rates, depending on the characteristics of the operations involved. To date, this has not occurred, and it is considered surprising the Bank of Mexico would utilize such authority.

2. Payment Obligations in Foreign Currency Contracted After December 20, 1982

This type of payment obligation, contracted within or outside of the Mexican Republic, is regulated by Article 12 of the Exchange Control Decree. These obligations may be paid by delivering the equivalent in national currency at the *controlled* rate of exchange in effect on the date on which the payment is made. Article 12 authorizes the Bank of Mexico to determine exceptions to the rule, "considering the nature of the obligations that the creditor of such obligations has at such time." In these exception cases the Bank of Mexico will specify the applicable rate of exchange.

According to a December 20, 1982 publication in the *Diario Oficial*, the Bank of Mexico issued the first exception by specifying that the *free* rate of exchange would be applied to payment obligations in foreign currency which were contracted as of December 20, 1982, within or outside of the Mexican Republic, but to be executed in Mexico, in favor of: 1) companies which render air, sea or overland transport services, provided the respective obligation is derived from contracts for the transport of persons or goods to or from other countries; and 2) companies which offer internationally used credit cards, provided the obligation charged to the card holder corresponds to expenditures made outside the Mexican Republic. In the *Diario Oficial* of January 17, 1983, the Bank of Mexico issued a new rule stating that the obligations therein referred to, contracted after December 20, 1982, would be subject to the

controlled rate of exchange or the *free* rate of exchange, depending on whether the payments correspond to operations subject to the *controlled* market or the *free* market respectively.

The export of merchandise which is made by any person or legal entity is included in the *controlled* market. The exporter is required to record his operations in any convertible and transferable foreign currency the Bank of Mexico accepts.⁸² Also required is the sale of exchange corresponding to the value of said exports to the Mexican credit institutions at the *controlled* rate of exchange, after deducting documented operating expenses authorized by the Secretary of Commerce. It is forbidden to contract for the payment of exports in Mexican currency.⁸³ The Secretary of Commerce is authorized to issue general provisions regarding those exports which cannot be practically or justifiably subjected to control due to their value or nature, or because they correspond to normal migratory movements.⁸⁴

Article 2 of the Exchange Control Decree specified several areas to be included in the *controlled* exchange market. These include exports, in-bond manufacturers, financing, imports, foreign service and international organizations, and rules of a general nature. On the advice of the Secretary of Commerce, the Bank of Mexico may authorize that the value of exports be applied to liquidate imports from among those the Secretary of Commerce determines have the right to the *controlled* rate of exchange.⁸⁵

Although not obligated, exporters are authorized to create deposits in national currency in credit institutions of the country. The return, payable periodically, is to be calculated at a rate of interest no less than the rate of devaluation of the Mexican peso in the *controlled* market with respect to the U.S. dollar. These deposits may only be credited with the product from the sale of exchange which the exporter is required to sell to the country's credit institutions. The Bank of Mexico may set limits for the amounts which may be credited to deposits, if in the Bank's judgment it obtains amounts above those necessary to give its account owners

82. In the Diario Oficial of December 20, 1982, the Bank of Mexico announced that the convertible and transferrable currencies, for this effect, are the following: Canadian dollar, U.S. dollar, Swiss franc, pound sterling, German mark, and others of immediate and total convertibility to the mentioned currencies.

83. Exchange Control Decree, at art. 3.

84. *Id.* at art. 2(a).

85. *Id.* at para. 2, art. 3.

adequate exchange coverage for foreign exchange payment requirements.⁸⁶ Transitory Article 7 of the Exchange Control Decree states that exporters may deduct twenty percent from the foreign exchange they are required to sell, provided this deduction is immediately applied to payment of debts in favor of foreign suppliers contracted prior to December 20, 1982, and registered no later than January 31, 1983.

Resolutions related to the exportation of merchandise were published in the *Diario Oficial* of December 20, 1982. They include:

1. The Complementary Rules on Exchange Control Applicable to Export, which were issued by the Secretary of Finance and Public Credit, the Secretary of Commerce, and the Bank of Mexico, include the following important rules, among others:

a) Before carrying out an operation, exporters must promise the credit institution of their choice to sell to the institution all foreign exchange corresponding to the value of the exports at the *controlled* buying exchange rate, after the deduction of the authorized associated expenses;⁸⁷ b) Credit institutions must register foreign exchange sale commitments presented to them appropriately signed by the exporter.⁸⁸ These foreign sale commitments are effective for ninety days from the registration date for use in the corresponding customs house;⁸⁹ c) Exporters are required to deliver diverse documentation to the credit institution, such as copies of the export document, invoice, and associated expenses voucher, within thirty days of the departure of merchandise from the country;⁹⁰ d) If applicable, exporters must provide the appropriate credit institution information regarding any modifications of the export or any return of previously exported merchandise;⁹¹ e) The sale of foreign exchange to be made by the exporter is subject to different rules when it involves cash or credit sales. In the case of cash sales, the exporter must sell the foreign exchange within thirty days from the departure of the merchandise from the country. If this period is exceeded, he may still sell the exchange within ninety days from the departure from the country, but at the exchange rate the

86. *Id.* at art. 4.

87. See Rule 2 Complementary Rules on Exchange Controls Applicable to Exports, D.O., Dec. 20, 1982 [hereinafter cited as Complementary Exchange Rules].

88. *Id.* at rule 3.

89. *Id.*

90. *Id.* at rule 4.

91. *Id.* at rule 5.

Bank of Mexico specifically publishes for this situation.⁹² Further extensions made must be authorized by the Secretary of Commerce on the recommendation of the Bank of Mexico taking into account the nature of the operation involved.⁹³ A special rule provided for the situation in which collection on exports is not achieved;⁹⁴ f) The exporter is exempted completely or partially from the obligation to sell the foreign exchange in three cases, the first two of which are already recognized by the Exchange Control Decree.⁹⁵ First, considering the opinion of the Secretary of Commerce, the Bank of Mexico authorizes the foreign exchange originating from a particular merchandise export to be applied partially or completely to liquidate imports of merchandise included in subparagraph (d) of article 2 of the Exchange Control Decree. Second, up to twenty percent is deducted from the foreign exchange originating from a particular exportation, and is applied to the payment of the exporter's debt in favor of foreign suppliers, contracted before December 20, 1982. The exporter is required to deliver to the credit institution, which registers the respective foreign exchange sale commitment, the corresponding Certificate of Registration in the registry of debts in favor of foreign suppliers, within the effective term. The third and new exemption is where the exporter sells merchandise abroad and compensation is made through reciprocal payment and credit agreements the Bank of Mexico has entered into with central banks of different countries;⁹⁶ h) If an exporter does not sell the exchange to the particular credit institution which has registered the respective foreign exchange sale commitment as required, apart from other penalties, the exporter's name shall be listed to prevent new foreign exchange sale commitments from being registered in his name;⁹⁷ i) Customs offices may only allow the export of merchandise which is documented with an export order complete with a current foreign exchange sale commitment duly registered by some credit institution and identified on the reverse side;⁹⁸ j) Interpretation problems of these rules are resolved by the Bank of Mexico in agreement with the Secretary of Commerce upon appeal of the credit institution. If the credit institution refuses to submit an

92. *Id.* at rule 6.

93. *Id.* at rule 7.

94. *Id.* at rule 8.

95. *Id.* at rule 11. *Cf.* Decree of Exchange Controls, at art. 2(a), (d).

96. *See* rule 11, para. (c), Complementary Exchange Rules.

97. *Id.* at rule 12.

98. *Id.* at rule 13.

appeal petition, the exporter may do so directly.⁹⁹

2. The Resolution which establishes the Registry of Debts in Favor of Foreign Suppliers, issued by the Secretary of Commerce, was published in order to comply with the registry created by the Transitory Article 7 of the Exchange Control Decree. This resolution considers a "contracted debt" as that debt which refers to merchandise imported into the country before December 19, 1982, and specifies documents which must be filed with the registry, including a copy of the contract from which the debt is derived, confirmation issued by the foreign supplier of the account statement, import orders, proof of the last payment, and the accounting document which lists the debts to foreign suppliers with the corresponding itemization.

3. The Secretary of Commerce issued a Resolution which exempts markets exports of the indicated merchandise, including those exported from the free zones of the country from the Controlled Foreign Exchange Market. The exports mentioned below are exempted from the *controlled* exchange market, including those made from the country's free zones:

- a) those with a value not greater than 200,000 pesos per week; b) those made in in-bond manufacturing companies registered with the Secretary of Patrimony and Industrial Development; c) those made by foreign embassies and consulates in their official capacities; d) household goods, equipment, and travel objects of diplomats; e) vehicles used in international service for freight or passenger transport; f) those regarding international service which are indispensable in the judgment of the customs authorities; g) those destined for maintenance of airplanes owned by national companies and aviation companies which provide international service; h) passenger baggage on trips abroad; i) household goods of emigrants and those foreigners who have lived in Mexico and are returning permanently to the exterior; j) those destined for cultural, teaching, research, or social service purposes exported by non-profit Mexican welfare, teaching or scientific institutions; k) articles of personal use of foreigners who have died in Mexico; l) merchandise samples produced in the country sent abroad for promotional or exhibition purposes; m) personal articles of drivers or crews of transport vehicles which make international trips; n) personal articles of nationals as well

99. *Id.* at rule 16.

as foreign residents when leaving the country, provided they are: costume jewelry, jewelry and component parts of precious metals, or plated with precious metals; manufactured articles of fine pearls, precious and semi-precious stones and synthetic or re-constructed precious stones; silverwork articles made by residents in the exterior on leaving the country valued at less than 200,000 pesos; o) numismatic money and coins with a net content of up to 200 grams of gold and up to 5 kilograms of silver; p) exports undertaken by the Bank of Mexico in conformity with certain tariff provisions of the General Export Tariff; q) temporary exports.

4. The Resolution of the Secretary of Commerce which exempts the exportation of bank notes of both Mexican and foreign banks from the requirement of prior permit from the Secretary of Commerce.

V. ADDITIONAL LEGISLATIVE REVISIONS

A. *In-Bond Manufacturers*

Payments made by in-bond manufacturers corresponding to wages, salaries, and leases, as well as purchases of goods and contracting of services of a national origin, are included in the *controlled* market. Payments for fixed assets or any other payments not listed in the above paragraph are exempt.¹⁰⁰ All foreign exchange held by in-bond manufacturers, which was to be converted to national currency in order to pay the accounts indicated above, must be sold to the country's institutions at the *controlled* exchange rate.¹⁰¹ Evidence documenting compliance with this provision must be preserved and at the disposal of the Secretary of Finance and Public Credit for five years.

In-bond manufacturers may not make payments for those accounts abroad or in foreign exchange, nor perform foreign currency exchange operations against national money with anyone other than the credit institutions of the country.¹⁰²

100. See Decree of Exchange Controls, at art. 2(b).

101. *Id.* at art. 5.

102. *Id.*

B. Financing

Principal and interest, as well as the other elements which the Bank of Mexico determines, relating to foreign exchange financing are included in the *controlled* market, but only if the financing is on behalf of the federal government or its public entities, is in favor of financial entities abroad and Mexican credit institutions, is payable outside the country, and is contracted or available as of December 20, 1982.¹⁰³ This provision applies equally to companies established in Mexico. Persons or entities which receive this type of financing must sell the acquired foreign exchange to the country's credit institutions at the *controlled* exchange rate.¹⁰⁴ An exception is made in those cases where the exchange is used to make payments of principal, interest, and other requirements corresponding to the financing or imports of merchandise subject to the *controlled* exchange rate.

Debts in foreign currency payable outside of Mexico contracted prior to December 20, 1982, on behalf of foreign financial entities, Mexican credit institutions, and creditors of financing payable abroad (outstanding on December 20, 1982) due through the "Special Financing Program" are regulated by transitory article 4. This article states that the Bank of Mexico shall "to the extent that is permitted by the availability of currency," sell at the *controlled* exchange rate to the federal government entities and to the companies established in the country, provided the obligation is registered in the Secretary of Finance and Public Credit. The Bank of Mexico is required to give priority in the sale of foreign exchange to the persons or entities planning to use the exchange to pay interests and other obligations corresponding to financing.

The Exchange Control Decree, also in transitory article 4, establishes a system of *exchange risk protection* solely on behalf of persons responsible for debts in favor of foreign financial entities, Mexican credit institutions, foreign suppliers, and creditors derived from the "Special Financing Program." It requires that credits only be accepted in that system which are restructured so as to expire in the long term or that have long term expiration. The Bank of Mexico will collect a premium to avoid a situation where the respective sales of foreign currency involve a subsidy on behalf of the interested parties. Payment obligations in foreign currency

103. *Id.* at art. 2(c).

104. *Id.* at art. 6.

contracted prior to December 20, 1982, to be performed in the Mexican Republic, are regulated by transitory article 3, which subjects them to the *special* exchange rate.

Transitory Article 5 of the Exchange Control Decree establishes that, with respect to debts payable outside Mexico due in foreign currency charged to the federal government administration and companies established in the country, the sale price of the corresponding exchange, at the *controlled* rate of exchange, must be delivered when the respective operation is contracted. The Bank of Mexico, however, "in accordance with the general provisions that have been established," must sell that foreign exchange at the *controlled* rate of exchange through some credit institution of the country within a period no greater than twenty-four months.

Persons or entities contracting long term financing are not required to deliver their exchange to the country's credit institutions since, based on transitory article 6, they may use the foreign exchange they obtain to liquidate debts charged to them in favor of foreign financing entities, foreign suppliers or credit institutions of the country and payable outside Mexico, with prior authorization from the Bank of Mexico, as long as these were contracted prior to December 20, 1982. Registration is required at the Secretary of Finance and Public Credit or the Secretary of Commerce when it involves debts in favor of financial entities abroad.

C. Imports

Merchandise imports and the documented costs associated with them payable abroad, which the Secretary of Commerce determines, as well as credits which are furnished by the suppliers of said merchandise, are also included in the *controlled* market.¹⁰⁵ But it is more a preference than an obligation, for it is the importer who is interested in obtaining the *controlled* rate of exchange. The importer is free to use the exchange rate of the *free* market without any restriction whatsoever, but will obviously seek the benefit of the *controlled* market so as to avoid a higher cost than that of his competitors.

A resolution from the Secretary of Commerce was published in the Diario Oficial of December 20, 1982, subjecting all the merchandise listed in the General Import Duty Tariff to the require-

105. *Id.* at art. 2(d).

ment of prior import license, including imports to the free zones, until December 31, 1983. This resolution contained exceptions largely with respect to certain imports of the Bank of Mexico, personal use merchandise of travelers entering the country, imports of border residents, and merchandise with a value of up to 5,000 pesos. Also on December 20, 1982, a resolution of the Secretary of Commerce was published identifying provisions of the General Import Duty Tariff included in the *controlled* foreign exchange market, subject to the corresponding import license being obtained from the Secretary of Commerce. It also specified that merchandise imported temporarily or permanently to be used in the production of articles for export is included in the *controlled* foreign exchange market.

Transitory Article 4 of the Exchange Control Decree provides that the Bank of Mexico shall, "to the extent that is permitted by the availability of currency," sell it at the *controlled* rate of exchange to the federal government, its entities, and to the companies established in the country, which have debts in foreign currency in favor of foreign suppliers payable outside of the Republic, contracted prior to December 20, 1982. Each debt must be recorded in the registry of foreign suppliers of the Secretary of Commerce. The rate used in this instance is that in effect on the date of the sale. The Bank of Mexico must give priority to people who are going to use the foreign exchange to pay debts in favor of suppliers derived from the import of merchandise entitled to the *controlled* rate of exchange.

D. Foreign Service and International Organizations

The expenses of the Mexican Foreign Service and the fees and contributions for Mexico's participation in international organizations are included in the controlled market.¹⁰⁶

E. Rules of a General Nature

Additional areas, which the Secretary of Finance and Public Credit determine on the proposal of the Bank of Mexico, in view of the importance to the national economy, shall also be included in the *controlled* foreign exchange market by means of rules of a gen-

106. *Id.* at transitory art. 8.

eral nature.¹⁰⁷

F. Foreign Exchange Sale Obligations

Those obligated to sell foreign exchange according to the Exchange Control Decree must deliver actual foreign exchange. These obligations may not be settled in any case through the delivery of documents denominated in foreign currency payable in the Mexican Republic, as would be the case of the Mex-Dollars.¹⁰⁸ Through a publication on December 20, 1982, the Bank of Mexico decided, for the purposes of article 13, that foreign exchange is defined as: foreign convertible and transferrable bank bills and currency, including the Canadian dollar, U.S. dollar, the Swiss franc, pound sterling, German mark, and any other with immediate, total convertibility to the mentioned currencies, as well as any deposit or document payable on sight from abroad charged to foreign financial entities and denominated in any of the mentioned currencies, which is acceptable by the bank which receives or makes the corresponding payments.

G. Mex-Dollar Accounts

The Exchange Control Decree establishes that special deposit accounts denominated in foreign currency, maintained in the country's credit institutions in favor of diplomatic or consular representative organs, international organizations, foreign citizens who render their services in the mentioned representative organs, organizations and institutions, as well as foreign correspondents of the communication media domiciled outside of the country who are accredited with the Secretary of the Interior, shall be maintained in the terms contracted, with the right for withdrawals payable in national currency to be made at the rate of exchange of the free market.¹⁰⁹

While the Exchange Control Decree does not refer to this matter, the Bank of Mexico has established internal rules for the credit institutions in the country, by means of which it is generally prohibited to open banking accounts in foreign currency for any

107. *Id.* at art. 2(f).

108. *Id.* at art. 13.

109. *Id.* at transitory art. 8.

Mexican resident or foreign person or entity. This limitation is subject to exceptions, such as companies located in the border areas and free zones, in-bond companies and others that are currently being regulated. It is generally established that depositors may not draw checks against said accounts which earn interest.¹¹⁰

VI. CONCLUSION

Every attempt has been made to retain objectivity in this analysis of Mexico's foreign exchange policies. This analysis commands the conclusion that the current exchange control system has limited and selective application, and is most certainly not the thorough and exhaustive regulatory system which was initially conceived. Foreign investors may freely repatriate both capital and dividends. Moreover, the sale, acquisition, possession, and remittance of foreign currency abroad is still legal. When compared with the stringent exchange controls established by the López Portillo administration, that were in effect only for a few months, the relative laxity of the present de la Madrid regulation becomes apparent. This freedom allowing for the unfettered transference of foreign exchange is of unquestionable importance to foreign and domestic investors alike. These investors, however, now have a historical precedent to keep them on guard. Only with time and the restabilization of Mexico's economic climate will one see this guard lowered.

110. *Id.* This is the case of Banco de Mexico's telex-circular with no number, dated December 18, 1982, regarding deposit accounts in U.S. dollars made by companies located in the border areas and free zones in the country. These deposits earn an interest, "not exceeding the interest rate of the euro-dollar market in deposits on sight in force in the corresponding period." The interest is paid monthly.